Filed 5/24/19 Horizon Resources Development, Inc. v. Quad Star Nutrition Group, LLC CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

HORIZON RESOURCES DEVELOPMENT, INC., Plaintiff and Appellant, v. QUAD STAR NUTRITION GROUP, LLC et al. Defendants and Respondents.	B287523 (Los Angeles County Super. Ct. No. KC067796)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dan T. Oki, Judge. Affirmed in part, reversed in part, and remanded.

Law Offices of Bin Li & Associates, Bin Li and Yichang Chen, for Plaintiff and Appellant.

No appearances for Defendants and Respondents Quad Star Nutrition Group, LLC; Amelia Tin; Western China Investment Corporation; and Yat Hung Cheung.

I. INTRODUCTION

Plaintiff and appellant Horizon Development Resources, Inc. (Horizon) brought an action asserting various causes of action against defendants and respondents Quad Star Nutrition Group, LLC (Quad Star), Amelia Tin, Western China Investment Corporation (Western China), Yat Hung Cheung (collectively defendants) and others[1] in connection with a dispute between Horizon and Quad Star over an agreement to produce and export infant formulas to China. After Horizon presented its case in a court trial, the trial court granted judgment in favor of defendants pursuant to Code of Civil Procedure section 631.8 (section 631.8). On appeal, Horizon contends the trial court erred in granting judgment on its breach of contract cause of action against Quad Star and on its conversion cause of action against Western China.[2] We reverse the judgment on Horizon's breach of contract cause of action against Quad Star and affirm the judgment on Horizon's conversion cause of action against Western China.

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[1] Jackie Mo and David Tin also were named as defendants in Horizon's first amended complaint. PBM Nutritionals LLC (PBM), which was named in Horizon's original complaint, was omitted from the first amended complaint. Horizon dismissed without prejudice Mo and Mr. Tin prior to the trial.

[2] Horizon also purports to challenge the judgment on its conversion cause of action against Quad Star, but does not address that issue in its appeal.

II. BACKGROUND[3]

On March 17, 2013, Horizon entered a Supply Agreement with Quad Star for the purchase of three products under the ultimate brand name of B'Regal: infant, toddler, and children's formula (collectively, formulas). Bo Sun, Horizon's president signed on behalf of Horizon. Ms. Tin, managing member of Quad Star, signed on behalf of Quad Star. The formulas were to be exported to China. Horizon held a license from China to import milk powder products into China. Horizon paid Quad Star $710,440 in advance for three containers of the formulas that were to be delivered within one year.

Nine months later, on December 2, 2013, Quad Star entered into a contract with Western China for the manufacture of the formulas for Horizon. Western China representative Mo and Ms. Tin informed Sun that Western China owned the formula for the "milk powder product" and would act as a middleman between Quad Star and the manufacturer, PBM. Western China would supply the formulas to Quad Star which

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[3] California Rules of Court, rule 8.204(a)(2)(C) provides that an appellant's opening brief must "[p]rovide a summary of the significant facts limited to matters in the record." Horizon's opening brief fails to comply with this rule when it relies on and cites exhibits and documents that were neither introduced nor admitted in evidence at trial. Our statement of facts disregards factual assertions in Horizon's opening brief that the record does not support. (*Mitchell v. City of Indio* (1987) 196 Cal.App.3d 881, 890 (*Mitchell*) ["'In reaching a decision on appeal an appellate court is governed by the record; will not consider facts having no support in the record; and will disregard statements of such facts set forth in a brief'"].)

would give them to Horizon. Quad Star paid Western China $614,680 to be deposited with PBM for the manufacture of the formulas.

In June 2014, Western China gave Ms. Tin an official government certificate, "the factory's analysis report of the infant formula," sample tins of the formulas, and labels. PBM supplied the samples and labels. Ms. Tin gave the samples and labels to Sun and instructed him to obtain Chinese government approval of the samples and labels.

Ms. Tin told Sun that Horizon had to obtain label approval before the formulas could be shipped. According to Cheung, Western China's owner, when an order was submitted to PBM, PBM would make a sample for the customer to submit for inspection in China. If the client did not obtain sample or label approval, then PBM would not manufacture the product.

Sun went to the Chinese government—"CCIQ"[4]—three times and showed a government official the formulas' labels reflecting their ingredients and was told which words needed to be changed. Once the changes were made, Horizon could import the formulas. Label approval was not required. Sun informed Ms. Tin of the minor changes that needed to be made, that label approval was not required, and that the formulas could be imported once the changes were made. Thereafter, Horizon waited for PBM to ship the formulas. Sun did not receive anything from the Chinese government that said Horizon could import the formulas without having the labels approved.

On June 3, 2015, Western China sent Quad Star a notice advising it to tell Horizon that time was running out and that

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[4] The Chinese government entity also appears to have been identified as "CCIC" and "CIQ."

Horizon should submit "all necessary" documents to Western China as soon as possible. Quad Star forwarded the notice to Horizon the next day. According to the notice, Western China had sent updated labels to Quad Star. PBM wanted to know of any label changes needed by "your side or Chinese Authority." It stated, "Remember all changes requirement must have official SEAL and Signed by CIQ Department."

Western China's notice encouraged Quad Star to contact it concerning any further changes or problems. It added, "[T]his is the final notice which we received from manufactory. If you do not return any call or Email to us as soon as you can, otherwise we will consider Your Company not interest to follow up this matter and the case will be going to dismiss."

On August 1, 2016, PBM sent Western China an email that stated, among other things, "As of yet we have not received the government approved labels for the B-Regal brand. Please provide an update on the status of the government approval of these labels. As indicated previously PBM will not be able to proceed without the receipt of the Chinese government approved labels."

On March 20, 2017, Cheung wrote to PBM requesting to cancel Western China's order and the return of $429,565.45 it paid PBM. Cheung explained that Western China was canceling the order because it had asked Quad Star about label approval and Quad Star had not responded. At the time of Cheung's testimony, PBM had not return Western China's payment. Western China did not intend to return to Quad Star any money PBM returned to Western China.

Sun testified that, other than a sample, Horizon had not received the three containers of the formulas. He stated that

Horizon terminated the Supply Agreement and neither Quad Star nor Western China had returned any of Horizon's money.

Ms. Tin testified that PBM did not manufacture the formulas because "[t]he very important last step that wasn't performed, we need to get a label approval with a reference number that we can submit . . . to the factory in order to proceed [with] the manufacturing of the products." That label approval would come from a "Chinese authority named CCIC." It was Horizon's responsibility under the Agreement to obtain label approval. She never received label approval from Sun. Cheung testified, "That's why we hold until now because we didn't receive any label approval from the Quad Star yet."

At the conclusion of Horizon's case, Western China and Cheung moved for nonsuit on Horizon's fraud and conversion causes of action against them. In opposition, Horizon argued the contract between Quad Star and Western China was a third-party beneficiary contract intended to benefit Horizon. Horizon did not address the fraud and conversion causes of action. The trial court rejected Horizon's third-party beneficiary contract theory noting, among other things, that Horizon had not sued Western China or Cheung for breach of contract. Without specifically addressing the fraud and conversion causes of action, the trial court granted judgment in favor of Western China and Cheung on those causes of action under section 631.8.[5]

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[5] Code of Civil Procedure section 631.8, subdivision (a) provides:

"After a party has completed his presentation of evidence in a trial by the court, the other party, without waiving his right to offer evidence in support of his defense or in rebuttal in the event the motion is not granted, may move for a judgment. The court

Quad Star and Ms. Tin made a "similar motion" to Horizon's breach of contract, fraud, and conversion causes of action against them. About the contract cause of action—as to these two defendants, the only cause of action at issue on appeal is the contract cause of action against Quad Star—Quad Star and Ms. Tin argued in part that plaintiff failed to perform by obtaining label approval. Without label approval, PBM would not manufacture the formulas.

The trial court asked how it was to determine whether label approval from the Chinese government was required based on the testimony. Counsel for Quad Star and Ms. Tin stated that Cheung "testified about that." The trial court inquired about the basis for Cheung's belief that Chinese government label approval was required. It observed that it had not seen "documentation or anything verifying" there was such a requirement. It further observed, "And then all I have is the oral testimony of Mr. Sun that he went at least three times to the CCIC and was told, no, you don't need a label approval."

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as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party, in which case the court shall make a statement of decision as provided in Sections 632 and 634, or may decline to render any judgment until the close of all the evidence. The court may consider all evidence received, provided, however, that the party against whom the motion for judgment has been made shall have had an opportunity to present additional evidence to rebut evidence received during the presentation of evidence deemed by the presenting party to have been adverse to him, and to rehabilitate the testimony of a witness whose credibility has been attacked by the moving party. Such motion may also be made and granted as to any cross-complaint."

The trial court granted judgment in favor of Quad Star and Ms. Tin on the contract cause of action under section 631.8. It stated, "[I]n answering my own question about where is something in writing talking about a requirement for government-approved labels, I'm looking again at exhibit 207, the e-mail of August 1, 2016, from . . . PBM, the manufacturer, to Mr. Cheung indicating 'as of yet we have not received the government-approved labels for the B' Regal brand. Please provide an update on the status of the government approval of these labels. As indicated previously, PBM will not be able to proceed without the receipt of the Chinese government-approved labels.'

"So at least I have something in writing from the manufacturer itself saying that they cannot proceed to manufacture the infant formula without Chinese government-approved labels. And to counter that, all I have is the testimony of Mr. Sun who says he spoke to some unknown, anonymous government official in China who assured him on three occasions that that was not necessary. [¶] So I cannot find at this point in time that Quad Star has breached the agreement by not fulfilling any of their obligations . . . ."

III. DISCUSSION

A. *Breach of Contract Cause of Action Against Quad Star*

Horizon contends that Quad Star's argument that there was a Chinese law that required government approval of the formulas' labels was an affirmative defense on which Quad Star had the burden of proof and on which burden of proof Quad Star

failed. Alternatively, it argues that if government approval was required, then Quad Star and not it was responsible for the failure to obtain government approval of the formulas' labels.

1. Standards of Review

"'"The standard of review after a trial court issues judgment pursuant to Code of Civil Procedure section 631.8 is the same as if the court had rendered judgment after a completed trial—that is, in reviewing the questions of fact decided by the trial court, the substantial evidence rule applies.'" [Citation.] "'But, we are not bound by a trial court's interpretation of the law. . . .'" [Citation.] "'We review legal issues . . . under a de novo or independent standard.'" [Citation.]" (*Orange County Water Dist. v. MAG Aerospace Industries, Inc.* (2017) 12 Cal.App.5th 229, 239-240.)

"We review issues of contract interpretation de novo unless there is an issue on which extrinsic evidence was properly admitted and there is a conflict in that evidence, in which case we review the trial court's interpretation under the substantial evidence standard. [Citation.]" (*Taylor v. Nu Digital Marketing, Inc.* (2016) 245 Cal.App.4th 283, 288.)

The determination of whether there was a breach of contract is a question of fact that is governed by the substantial evidence test. (*Ash v. North American Title Co.* (2014) 223 Cal.App.4th 1258, 1268.)

"Under the substantial evidence standard of review, our review begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the trial court's factual

determinations. [Citations.]" (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 501.) The testimony of a single witness is sufficient to satisfy the substantial evidence test. (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981.)

2. The Supply Agreement

The Supply Agreement contained the following terms:

Horizon was to "[o]btain all necessary Approvals[.]" "Approvals" meant "all approvals, licenses, stamps, certifications, grants, permissions, and all other authorizations required by the Authorities in connection with [Horizon]'s activities contemplated by this Agreement, including without limitation the export, transport, import, customs clearance, inspection, testing, registration, distribution, marketing, and sale of the Products." "Authorities" meant "governments, governmental agencies, regulatory bodies, courts, similar organizations, and any person, entity, or other organization operating on their behalf."

Quad Star was required to "[p]rovide commercially reasonable support and documentation needed by [Horizon] to obtain Approvals[.]"

Quad Star represented and warranted that "[t]he nutritional information and ingredients listed on the English label copy supplied by [it] accurately describes the Product." Horizon acknowledged that Quad Star bore "no responsibility for any Product label language translations [Horizon] may make or modify."

Upon request, Horizon was required to "provide [Quad Star] with written confirmation that proposed Product formulations comply with all applicable laws in the Territory,

and that all non-English language labels are accurate and comply with applicable Laws." The "[t]erritory" was the People's Republic of China.

3. Analysis

a. Chinese government label approval

There was a conflict in the evidence about whether the formulas could be imported into China without the Chinese government's approval of the formulas' labels. Sun, Horizon's president, testified that he spoke with a Chinese government official three times and was told that label approval from the Chinese government was not required. Ms. Tin, Quad Star's managing member, and Cheung, Western China's owner, testified that Chinese government label approval was required and that the failure to obtain label approval caused PBM not to manufacture the formulas. PBM, the formulas' manufacturer, sent Western China an email informing it that it would not be able to proceed without "Chinese government-approved labels."

We need not decide whether the Chinese government required label approval for the formulas because, as we hold below, Quad Star and not Horizon was responsible for the contents of the samples and labels Horizon submitted to the Chinese government and, accordingly, Quad Star and not Horizon was responsible for Horizon's failure to obtain Chinese government label approval.

b. Quad Star's breach

Horizon argues if Chinese government label approval was required, then Quad Star was at fault for providing it with labels that were not approved. We agree.

"A party to a contract cannot take advantage of [its] own act or omission to escape liability thereon. Where a party to a contract prevents the fulfillment of a condition or its performance by the adverse party, [it] cannot rely on such condition to defeat [its] liability." (*Schellinger Brothers v. Cotter* (2016) 2 Cal.App.5th 984, 1006, internal quotation marks and citations omitted.)

Horizon was obligated under the Supply Agreement to "[o]btain all necessary Approvals," which approvals would have included any label approval required by the Chinese government. Quad Star in turn was required to "[p]rovide commercially reasonable support and documentation needed by [Horizon] to obtain Approvals" by the Chinese government. Further, Quad Star represented and warranted that "[t]he nutritional information and ingredients listed on the English label copy supplied by [it] accurately describes the Product."

Ms. Tin gave Sun formulas samples and labels from PBM and instructed him to obtain Chinese government approval of the samples and labels. Sun went to China for sample and label approval. A Chinese government official told Sun that minor changes needed to be made to the labels and Sun communicated those changes to Ms. Tin.[6] Because Quad Star and not Horizon

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[6] Horizon states that it has moved this court to take additional evidence in the form of a Chinese government report

was responsible for the contents of the samples and labels and thus for the failure to obtain Chinese government label approval, Quad Star "prevent[ed] the fulfillment of a condition or its performance by the adverse party, [and] [it] cannot rely on such condition to defeat [its] liability." (*Schellinger Brothers v. Cotter, supra,* 2 Cal.App.5th at p. 1006.) Accordingly, we reverse the judgment as to Horizon's breach of contract cause of action as to Quad Star.

B. *Conversion Cause of Action Against Western China*

The trial court granted judgment in favor of Western China on Horizon's conversion cause of action. As noted above, it made no specific findings in support of that judgment. After granting judgment in favor of Quad Star and Ms. Tin on all causes of action, the trial court stated that the evidence indicated that PBM still held $429,000 of Horizon's money, which money Western China expected PBM would return. It recommended—but expressly did not require as part of its judgment—that Western China return that money to Horizon if Western China could not find another manufacturer to fill Horizon's order.

Horizon contends the trial court's finding that PBM was in possession of Horizon's money was error. Instead, Horizon asserts, PBM returned the money to Western China before the trial, a fact it claims it can prove through "newly discovered" evidence. The "newly discovered" evidence is a purported email Horizon's trial counsel received from PBM's counsel the day before the court trial started—which Horizon's trial counsel did

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identifying the inaccuracies in the formulas' labels. No such motion has been filed.

not read until after the trial ended—in which email PBM's counsel claimed PBM had returned $473,256 to Western China two weeks earlier.

"It has long been the general rule and understanding that 'an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.' [Citation.]" (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) "[I]t is well established that a reviewing court may not give any consideration to alleged facts that are outside of the record on appeal." (*CIT Group/Equipment Financing, Inc. v. Super DVD, Inc.* (2004) 115 Cal.App.4th 537, 539, fn. 1; *Mitchell, supra,* 196 Cal.App.3d at p. 890.) The declaration and email Horizon cites are not in the record on appeal and therefore we cannot consider them.[7] Because Horizon had not raised any other challenge to the trial court's ruling on Horizon's conversion cause of action against Western China, we affirm the judgment.

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[7] Horizon states in its opening brief that it had prepared and would file a motion for this court to take additional evidence—apparently PBM's counsel's email and a supporting declaration from Horizon's trial counsel—under Code of Civil Procedure section 909 and California Rules of Court, rule 8.252(b). Whether or not such a motion would have been successful (see *Diaz v. Professional Community Management, Inc.* (2017) 16 Cal.App.5th 1190, 1213 ["'The power to take evidence in the Court of Appeal is never used where there is conflicting evidence in the record and substantial evidence supports the trial court's findings.' [Citation]."] Horizon has not filed a motion to take additional evidence.

IV. DISPOSITION

The judgment is reversed as to Horizon's breach of contract cause of action against Quad Star and affirmed as to Horizon's conversion cause of action against Western China. No costs awarded on appeal.

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KIM, J.

We concur:

BAKER, Acting P. J.

MOOR, J.